IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.17/1996

1. Pramod S. Nadkarni,
Additional Collector,
North Goa District, Panaji, Goa.

2. V.M. Dhume,
Secretary, Konkani Academy,
Circuit House, Panaji, Goa.

3. Subhash V. Shirodkar,
Director of Social Welfare,
Panaji, Goa.

4. S.S. Dharangutti,
Chief Executive Officer,
Khadi & Village Industries,
Junta House, Panaji, Goa.

5. Ganesh Chimulkar,
Director of Employment Exchange,
Shanta Building, St.Inez,
Panaji, Goa.

6. G.G. Kambli,
Director of Panchayats,
Junta House, Panaji, Goa.

7. V.S. Sawant,
Managing Director, Goa Housing
Board, Porvorim, Goa.

8. R.F. Korjuvekar,
General Manager,
Goa Handicrafts Rural and
Small Scale Industries Develop-
ment Corporation,
Neuginagar, Panaji. ..... Petitioners.

V/s.

1. State of Goa,
through the Chief Secretary,
Secretariat, Panaji.

2. J.B. Singh,
Commissioner of Excise,
18th June Road,
Panaji, Goa.

3. Cholletti Prabhakar,
C/o. Executive Director,
Pradhaw Madhurai,

18 Periyar Kerli Street,
S.S. Colony Madhurai.

4. W.V. Ramana Murthy,
Director of Printing &
Stationery, Panaji, Goa.

5. Pratapsingh Meena,
General Manager,
District Industries Centre,
Dadra & Nagar Haveli,
Silvassa.

6. Shri D.A. Hawaldar,
Director of Information,
Udyog Bhavan,
Near Azad Maidan, Panaji,Goa.

7. Shri N. Suria Narayan,
Jt. Director Industry,
Udyog Bhavan, Near Azad Maidan,
Panaji, Goa.

8. Sherinivas Reddy,
Gen. Manager, Marketing,
Supply Federation,
Near Market, Panaji, Goa.

9. Meera Vardhan,
Managing Director,
Sanjivani Sahakari Sakhar
Karkhana Ltd.,
Dayanand Nagar, Pillin,
Dharbandora, Sanguen, Goa. ..... Respondents.

Mr. J.E. Coelho Pereira, Sr. Advocate with Mr J. Godinho,
Advocate for the petitioners.

Mr. H.R. Bharne, Govt. Advocate for respondent No.1.

Mr. V.B. Nadkarni, Sr. Advocate with Mr. Y.V. Nadkarni,
Advocate for respondents No.2, 4, 6, 7 & 8.

CORAM: F.I. REBELLO &
P.V. HARDAS, JJ.

DATE: JUNE 16, 2003.

ORAL JUDGMENT: (Per REBELLO, J.)

The petitioners herein, at the time of filing of the petition, were promotees, holding Grade II posts in the Goa Civil Service Cadre. Respondents No.2 to 9 are also holding Grade II posts in the same cadre but their appointment, however, was by direct recruitment. At the time of hearing of this petition, only petitioners No.5 and 6 continue in service. Rest of the petitioners have since retired. Petitioners No.5 and 6 were initially appointed on ad hoc basis as Grade II Officers with effect from 24.5.1984. Those ad hoc promotions were extended from time to time, the last extension being 23.2.1985 for a period of three months. The petitioners herein by order dated 16.5.1985 were promoted along with others on officiating basis in terms of Rule 25 of the Goa, Daman & Diu Rules, 1967 (which hereinafter be referred to as the "Service Rules"). The petitioners have been thereafter promoted as Grade I Officers in the Goa Civil Service, on regular basis with effect from 3.7.1996 along with respondents No.2 to 9 vide Orders dated 3.7.96 and 11.8.96.

2. Rules have been framed for appointments to the Goa Civil Service which consisted of two groups - (1) Grade I (Selection Grade) and (2) Grade II. Pursuant to the amendment to the Service Rules, in 1997, the said posts have been re-designated as Junior Scale, Senior Scale, Junior Administrative Grade and Selection Grade. The Service Rules provide the method of recruitment.

Under Rule 5, recruitment to the service had to be made in the following manner :

(a) not more than 50 % of the substantive vacancies which occur from time to time in the authorised permanent strength of the service shall be filled by selection in the manner specified in Part IV of the Service Rules;

(b) the remaining such substantive vacancies shall be filled by selection in the manner specified in Part V of the Service Rules.

By proviso, in so far as appointments by selection, the Administrator was conferred with power from holding a vacancy in abeyance, or filling it on an officiating basis in accordance with the provisions in Part VIII of the Service Rules.

Sub-Rule (2) further provides that if the exigencies of service so require, the Administrator may, in consultation with the Commission, vary the percentage of posts to be filled by each method specified in sub-Rule (1). Part IV deals with method by which direct recruitments have to be made and part V deals with the recruitment by selection. Under Rule 24, power has been conferred on the Administrator in the situation covered by

said Rule, to make appointment on officiating basis. That had to be done thereafter in the manner provided under Rule 23. The next relevant Rule is Rule 28, which pertains to seniority. Rule 28(iii), as it then stood, read as under :

> "The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under rule 5."

These Rules have been amended from time to time.

In so far as the subject matter of this petition is concerned, relevant is the amendment made on 18.7.1991. By this amendment, Rule 2 (e) was substituted for the earlier rule under which the 'member of the Service' was defined. Earlier persons appointed on officiating basis were not included within the definition of "Member of the Service". Pursuant to the amendment of 1991, a "Member of the Service" means a person appointed on regular basis i.e. officiating including temporary basis to any one of the three grades of the Service and includes a person appointed on probation to Junior Grade of the Service. Similarly, Rule 28 of the Service Rules was also amended

by the amendment of 18.7.91 by the following sub-Rule (ii) to Rule 28, which now reads as under :

> "(ii) The relative seniority of direct recruits and of promotees shall be determined in accordance with the Goa Government (Seniority) Rules, 1967, as amended from time to time."

Under Rule 1 of the Amended Rules of 1991, the said Rules were to come into force at once, except item (i) of clause (a) of sub-rule (1) of Rule 29 which is deemed to have come into force on 1st January, 1986, with which we are really not concerned. Therefore, in so far as rule pertaining to seniority is concerned, on publication of the Rules in Gazetted on 18.7.1991, the seniority would have to be fixed in terms of the Goa Government (Seniority) Rules, 1967. What is the effect of this on earlier appointments either by direct recruitment or promotion, would be discussed later on in the course of the Judgment.

3. For the sake of discussion, the dates of appointment of the respondents may be set out as under :

Respondent No.2 on 26.07.1985.

Respondent No.3 on 24.07.1985.

Respondent No.4 on 19.08.1985.

Respondent No.5 on 29.09.1986.

Respondent No.6 on 15.07.1988.

Respondent No.7 on 27.06.1988.

Respondent No.8 on 17.06.1988; and

Respondent No.9 on 20.05.1988.

To complete the narrative, from the affidavit of G.J. Prabhudessai, we find the total vacancies by direct recruitment and promotion, were as under :

Vacancies notified		Candidates recommended		Officer appointed		Remarks
Period	Vacancies	Period	Candidates	Period	Officers	
1967 to 1979	32	1968 to 1979	23	1968 to 1979	12	11 declined offer of appoitment.
1980 to 1984	18	1981 to 1985	18	1981 to 1985	8	10 declined offer of appointment.
1985 to 1987	11	1986 to 1988	11	1986 to 1988	8	3 declined offer of appointment
TOTAL	61		52		28	

Appointments to Goa Civil Service by Promotion -

Period to which vacancies relate	No.of vacancies		No. of officers promoted		Year in which promotions made	Remarks
	Permanent	Temporary	Substantive	Officiating		
1967 to 1970	10	--	10	--	1971	
1971 to 1981	10	35	8	*43	1983	*Out of 43, 34 have been appointed in substantive capacity against permanent vacancies for the period from 1982 to 1990
1982 to 1990	36@	-	*34	-	1990	
1985	--	36	--	36		
1987	--	21	--	21		
TOTAL	56	92	52	57		

@ Including 6 diverted from direct recruitment quota with the approval of Union Public Service Commission in March, 1986 and another 6 diverted from direct recruitment quota with the approval of Goa Public Service Commission in June, 1990.

4. In the present petition, we will confine ourselves to the impugned seniority list, without referring to the earlier seniority list. The impugned seniority list is dated 26.6.1995. While issuing the seniority list, respondent No.1 in para 1 of the Seniority List, was pleased to set out as under :

(i) The Goa Civil Service Rules provide for

specific quota i.e. 50 % of the vacancies are earmarked for direct recruits and 50 % for the promotees.

(ii) During the period from 1979 to 1987, there was substantial failure of quota rule as explained in the Circular letter dated 1.4.1993 and as such, it is not possible to determine the seniority in accordance with Rule 28 of the Goa Civil Service Rules.

(iii) Officers appointed on officiating basis by duly constituted D.P.C. are entitled to seniority from the date of their officiating appointment. This is as per the Supreme Court Judgment in the cases of G.S. Lamba and Shri Narendra Chadda which has again been applied in the case of Direct Recruit Class II Engineering Officers Association and Others v/s. the State of Maharashtra and others, also decided by the Supreme Court.

(iv) While accommodating the officers against the substantive vacancies, availability of such vacancies during the particular period has been taken into consideration. In the absence of availability of such vacancies, the officers are

placed below in the subsequent year in which substantive vacancy is available.

(v) in Writ Petition No.120/1988, it has been held by the High Court of Bombay, Panaji Bench, that once the officers are promoted on temporary basis, they are to be substantively appointed on the basis of their initial selection/seniority an they should not be again subject to the process laid down in Part V of the Goa Civil Service Rules.

In this seniority list, the respondents have been placed senior to the petitioners.

5. On behalf of the contesting respondents, one of the respondents J.B. Singh has filed his affidavit. In that it has been pointed out that the respondents have filed a petition being Writ Petition No.219/95 and in that petition, they have challenged the fixation of seniority of the respondents in that writ petition on the ground that services of those respondents have been counted in violation of the existing service rules. The respondents have relied on the averments made in the said petition for supporting their contentions in this writ petition. It is their contention that once rules had been framed under Article 309 of the Constitution of India, respondent No.1 was bound to follow such rules. Reliance is placed on the

Judgment, in Keshav Chandra Joshi and ors. vs. Union of India and others, AIR 1991 SC 284 to contend that the issue is finally concluded by the Judgments of the Apex Curt. It is specifically set out that the appointments of the petitioners was under Rule 25 of the Civil Service Rules and as such, they were not members of the Goa Civil Service, considering Rule 5(1)(b) of the Goa Civil Service Rules. It is then pointed out that respondent No.1 has not correctly followed the ratio of the Judgment of this Court in Writ Petition No.120/1988. It is pointed out that all that the Court in that petition held was that once candidates are selected on officiating basis, they are to be appointed to substantive posts on the basis of that selection, subject to fitness. It is pointed out that in that Judgment, this Court did not decide the issue of fixation of seniority. Reference is then made to Rule 28 as it earlier stood and that the seniority of direct recruits and promotees is required to be determined according to rotation of vacancies between direct recruits and promotees and based on quota of vacancies reserved for direct recruits and promotees. Our attention is invited to two notifications by respondent No.1, one on 17.3.1986 whereby six vacancies meant for direct recruits were diverted to the quota of promotees and similarly another Notification of 13.6.1990 whereby another six posts meant for direct recruits were diverted to the quota of promotees. It is, therefore, contended that in view of

that, only twelve additional posts, meant for direct recruits, could have been filled in by the promotees. It is contended that considering all these facts and circumstances, contention by respondent No.1 that the rule of rota-quota has broken down, is not correct, nor the petitioners have established that the rota-quota rule has broken down. It is, therefore, pointed out that under these facts and circumstances, this Court should not interfere with the seniority list whereby the petitioners have been placed senior to the respondents.

6. On behalf of respondent No.1 G.J. Prabhudessai, Joint Secretary (Personnel) has filed his affidavit. It is pointed out that the method of recruitment envisaged that not more than 50 % of the substantive vacancies which occur from time to time in the authorised permanent strength of the service, had to be filled in by direct recruitment in the manner specified in Part IV i.e. by competitive examinations conducted through the Commission and the remaining by selection in the manner specified in Part V, i.e. by promotion from amongst eligible officers. It is then pointed out that in so far as direct recruitment is concerned , between the years 1967 to 1987, in all 61 vacancies were notified to the Government of India for which only 52 candidates were recommended, however, only 29 of them joined the services. Up to 1985 out of 41 direct recruits recommended for 50

vacancies notified, only 20 actually joined the services. A reference is then made to the vacancies which were diverted from the quota of direct recruits to that of promotees.

It is then pointed out that in so far as promotions are concerned, the first batch of 10 officers who were absorbed employees from the erstwhile Portuguese regime, holding feeder posts, came to be appointed in the services in substantive capacity in the year 1971. It was only, thereafter, in the year 1983 that the selection committee met again to consider eligibility of officers for promotion against 10 substantive vacancies and 35 temporary vacancies which occurred during the year 1971 to 1981. The Selection Committee again met in the year 1985 and considered all the eligible officers excluding those who were appointed in substantive capacity in the year 1983, prepared a panel of 7 officers for promotion to substantive vacancies which occurred during the years 1982, 1983 and 1984 and a panel of 71 officers for officiating promotion to Grade II of the service. It is pointed out that based on the recommendations of the Committee, seven officers were promoted to hold Grade II substantive posts included in Schedule I and 71 to Grade I duty posts. The Selection Committee again met for the fourth time and considered all the eligible officers for promotion. At this time, it was panel of 13 officers for

filling up the substantive vacancies which occurred during 1985 and 1986 and a panel of 67 officers for officiating vacancies of 1987. Various other facts have been set out which need not be adverted to. In paragraph 17 of the affidavit it is set out that that it was only in the year 1995 that the seniority list was finalised based on the principles contained in Rule 7 of Goa Government (Seniority) Rules, 1967 as amended by the Goa Government (Seniority) (First Amendment) Rules, 1987. Before doing this, guide-lines which were proposed to be taken into consideration for the purpose of determining the seniority of the officers concerned on 1.4.1993, were circulated and the objections against the said guide-lines were sought and then taken into account before finalising the impugned seniority list on 28th June, 1995.

8. On behalf of the petitioners, it is contended that the seniority list as finalised, has not taken into consideration the continuous officiating appointment of the petitioners from the year 1985. It is further pointed out that the respondent No.1 themselves have accepted that the rota-quota rule has broken down. Once that be the case, it is contended that the petitioners had to be bunched together on the date of appointment and considering their first order of officiating appointment which is by Notification dated 16.5.1985 at least against the contesting respondents at Serial No.46 and 49, their

date of appointment should be held as 16.5.1985. The petitioners, it is contended, have been appointed after 26.7.85. The respondents are, therefore, junior to the petitioners and in these circumstances, the seniority list to the extent that the petitioners herein are aggrieved, be set aside and they be given due seniority from the date of first officiating appointment, i.e. 16.5.1985. Reliance is placed on various Judgments. They will be adverted to in the course of the discussion.

On behalf of the contesting respondents, their learned Counsel contends, that as the petitioners themselves contend that they have to be included in the Goa Civil Service on the date of their appointment, for the purpose of seniority, what had to be considered was the rules as they then stood, including Rule 28, considering that the case of the petitioners themselves was that they should be given seniority based on the date of appointment. The petitioners and the respondents were all appointed prior to the amendment to Rule 28 of the Goa Civil Service Rules which came into effect from 1991, by which the Goa Government (Seniority) Rules were made applicable in so far as seniority is concerned. It is further pointed out that no appointments could have been made against the posts available for direct recruits unless the Administrator had exercised his power under Rule 5 of the Civil Service Rules. The Administrator has

exercised his powers only in respect of 12 vacancies, six of them in the year 1986 and six in the year 1990, which is really not important. In these circumstances, it is pointed out, that the respondents could not have been appointed on substantive basis under the Goa Civil Service Rules and as such, they were rightly appointed on officiating basis. The various Judgments relied upon, it is contended, provide that it is only those appointments which are made in terms of the Rules where the date of officiating appointment has to be counted and not in cases where the appointment itself is not in conformity with the Rules and consequently the petitioners are not entitled to claim seniority from the year 1985, as they have been unable to show that their appointments were against the substantive vacancies, i.e. prior to the amendment which came into effect from 1991. The amendment can be of no assistance to them as it does not apply retrospectively, as can be seen from the Rules themselves.

9. From the above, the real question is whether the Court should interfere with the seniority list as published. In the first instance, we may consider the Judgment of this Court on which reliance was placed by respondent No.1 for fixing the seniority i.e. Writ Petition No.120/88. The issue in that petition was the grievance of the petitioners therein who had been earlier appointed on officiating basis and even then were not

considered for selection at the second selection. It was their contention that once they were appointed on officiating basis, there was no question of they being again considered for selection. All that could be considered is their unfitness, if at all, to remain in the post. It is in that context that the Division Bench was pleased to hold that the petitioners therein who had been promoted on temporary basis to the duty posts Grade II of the Goa Civil Service by the order dated 19.7.1983, were to be appointed substantively on the basis of their seniority as per the list finalised under Order dated 19.7.1983, subject to they being found otherwise fit at the time of their substantive appointment. The issue of rota quota was not at all involved in that petition. The only issue raised in that petition was that as they were duly selected against the vacancies, there was no question of re-selecting them. The Division Bench of this Court held that as they were appointed to officiating posts based on selection, they are to be appointed against the substantive vacancies as and when they arise on the basis of their seniority. Therefore, the said Judgment of this Court is of no assistance in deciding the issue of seniority in between the direct recruits and the promotees.

Having said so, let us now examine the other Judgments which have been relied upon. In the case of

Narender Chadha and others v. Union of India and others, (1986) 2 SCCs 157, from the facts, it may be noted that some persons were allowed to function in higher posts for 15 to 20 years. The Apex Court had held that on the facts of that case, considering the long period, that the rota quota rule had broken down. Accordingly the Apex Court directed consideration of their seniority from the date of their first appointment. Narender Chadha and ors. (supra) thereafter has been explained in the State of W.B. and ors. v. Aghore Nath Dey and ors., (1993) 3 SCCs 371 as also in the case of Keshav Chandra Joshi and ors v. Union of India and ors., AIR 1991 SC 284. The Apex Court has explained that Narendra Chadha's case was decided on the facts of that case considering the long period of appointment.

We then come to the Judgment relied upon on behalf of the petitioners in the case of O.P. Singla and anr. v. Union of India and ors., (1984) 4 SCCs 450. This Judgment will be relevant apart from the proposition for which it has been relied upon, namely that officiating service should be considered for seniority also for another proposition considering the language of the recruitment rules. The matter pertained to the appointment to the Delhi Higher Judicial Service Rules. There also appointment was by promotion as well as by direct recruitment. The proviso for direct recruitment

provided that not more than one third of the substantive posts in the Service shall be held by direct recruits. In other words, the appointment of direct recruits could be upto one third. That rule and other rules came up for consideration before the Apex Court. The language in the Goa Civil Service Rules is similar. The question before the Apex Court was whether the provision for quota meant imposing a ceiling. The Apex Court then considering the various Rules stated that the rules must be read together and a combined reading yields but one result, that the proviso prescribes a quota of one third for direct recruits. The second question was regarding the officiating appointment. In so far as promotees are concerned, the Apex Court held that the such posts had to be filled in consultation with the High Court and, in these circumstances, the seniority ought to be counted when the promotees were first appointed even on officiating basis.

The issue of counting service in officiating posts came up again for consideration in Union of India and anr. v. Harish Chander Bhatia and ors., (1995) 2 SCCs 48. The Apex Court therein held that the Judgment in O.P. Singla and another (supra) had been based on the facts of that case. After considering the rules, the Apex Court held as under :

> "According to us, the just and proper order to be passed would be to direct the appellants to treat the dates of officiating appointments of the respondents as the date of their regular appointments and then to place them in the seniority list as required by Rule 29 i.e. to interpose a direct recruit in between two promotees as per their respective inter se seniorities; and we direct accordingly. The seniority would, therefore, be refixed of all concerned, not as per length of service alone as ordered by the Tribunal, but as indicated by us."

It is, therefore, clear that while fixing the seniority between the promotees and the direct recruits, it is not only the length of service that has to be considered, but the quota rule has also to be considered. The rules in Harish Bhatia's case are similar as in the case of Goa Service Rules. The issue of rota quota again came up for consideration before the Apex Court in Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and ors., (1990) 2 SCCs 715. The relevant proposition of law, as summed up by the Apex Court, are in paragraph 47. What is relevant in our opinion are principles as set out under items (C), (E) and (F), which read as under :

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources and if rules are framed in this regard they must ordinarily be followed strictly.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

It is, therefore, clear from the proposition as laid down in the Direct Recruit class II Engineering Officers' Association (supra), that what is relevant is that mere break down of the quota rule is not enough, but the rules must permit the authorities to relax the

provisions relating to the quota, so that the post reserved for direct recruitment can be filled in by promotees. In the instant case, as we have earlier seen, there is a power under Rule 5, sub-Rule(2), but it was for the Administrator to so do. The administrator has done it only twice, once in the year 1986 for six vacancies and then in the year 1991 for six vacancies. Therefore, it is clear that at the highest, rules were relaxed in so far as quota reserved for direct recruits only to the extent of 12 vacancies. The other vacancies could not, therefore, have been filled in by promotees.

9. It is in this context that the appointments on officiating basis have to be considered. Merely because direct recruits had not been appointed and consequently appointments had to be made on officiating basis would, by itself, not give a promotee right of having his service counted unless there was a vacancy available to be filled in by a promotee. The vacancy could be a permanent or temporary vacancy, but vacancy meant for a promotee against which such a person could be appointed on regular or temporary basis. It is thus clear that in none of the Judgments cited is there an universal rule, that every officiating service has to be counted for seniority for all purpose de hors the rules. It is only in those cases, where the authorities can relax the provisions relating to quota and have so relaxed that the

Apex Court had said that the posts meant for direct recruits can be filled in by promotees and in which event the officiating service can be counted. The exceptional cases where long officiating service has been counted, have been explained in the subsequent Judgments of the Apex Court, as being on the facts of those cases.

Considering the above, it is, therefore, clear that the appointment under the Goa Service Rules on officiating basis which the petitioners seek to be counted for the purpose of their seniority, cannot be counted as they have been unable to show that they were appointed against substantive vacancies. They were also not members of the service as contemplated under Service Rules as it then stood when they were first appointed. The Administrator also did not transfer these posts for recruitment by promotions. Apart from that, it may also be pointed out that respondents No.2, 3, 4, and 5 were appointed in the year 1985-86 and the other respondents were appointed in the year 1988 against substantive vacancies. It cannot, therefore, be said that the promotees were holding office for a long time, vis-a-vis the direct recruits. The direct recruits/respondents were appointed in 1985, 1986 and four of them in the year 1988. In view of the matter, we do not find that this to be a fit case where this Court should interfere with the list as prepared, considering what has been set out in the

earlier part of the discussion. We are, therefore, not inclined to interfere with the seniority list, which is the subject matter of the petition.

In the light of that, rule discharged. There shall be no order as to costs.

F.I. REBELLO, J.

P.V. HARDAS, J.

ssm.